No._____

Supreme Court, U.S.
FILED

In The 98 301 AUG 17 1998
Supreme Court Of The United States

OCTOBER TERM, 1997

RONALD LEE PENNIX,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether Pennix's constitutional right to a fair trial and due process was violated due to the trial court's refusal of Pennix's proposed jury instruction and by incorrectly instructing the jury concerning the definition of a "single transaction"?
2. Whether Pennix's constitutional right to a fair trial and due process of law were by the trial court's abuse of discretion in refusing to provide the jury with a copy of the written charge to take with them during deliberations, in light of the fact that the court provided the jury with a copy of the indictment?

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PETITION FOR WRIT OF CERTIORARI

Ronald Lee Pennix respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, reproduced in the Appendix at Pages 34 - 56 herein.

OPINIONS BELOW

On April 11, 1997, Pennix proffered a jury instruction regarding the government's burden of proof in establishing that he was a member of an alleged conspiracy. The trial court refused his instruction and gave a less definitive jury instruction, to which Pennix noted his objection.

After the jury was charged, Pennix moved that a written charge be provided to the jury, in light of the fact that the trial court was allowing a copy of the indictment to be taken to the jury room. The trial court denied his motion.

The opinion of the United States District Court for the Western District of Virginia at Lynchburg, Case Number 96-CR-70063-017, is unreported and reproduced in the Appendix, herein, at Pages 20 - 33.

Subsequent to his conviction, Pennix appealed this ruling to the United States Court of Appeals for the Fourth Circuit, but his claims were rejected and his convictions were affirmed in an unpublished decision, United States of America v. Ronald Lee Pennix, Case No. 97-4575 No rehearing was requested.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under the due process of law clause of Amendment V of the Constitution of the United States

The judgment of the United States District Court, Western District of Virginia was entered July 9, 1997, and a timely petition for appeal to the United States Court of Appeals for the Fourth Circuit was denied May 20, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C.§841(a)(1)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance...

21 U.S.C. §846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. §924(c)(1)

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . .

STATEMENT OF THE CASE

A. The Parties

Petitioner is Ronald Lee Pennix (Pennix).

Respondent is the United States of America.

B. The Action Below

1. The Indictment

Pennix was one of the subjects of a seventeen-count indictment filed November 22, 1996, by a Grand Jury for the Western District of Virginia. Three of those counts charged Pennix with conspiracy to distribute cocaine in violation of 21 U.S.C. §846; distribution of cocaine base in violation of 21 U.S.C. 841(a)(1), and possession of a firearm in relation to drug trafficking in violation of 18 U.S.C. §924(c)(1), as charged in Counts 1, 7, and 8, respectively, in the indictment. Pennix was also the subject of a criminal forfeiture pursuant 21 U.S.C. §853; however, the forfeiture proceeding was later dismissed on the government's motion, forfeiture having already taken place in state court.

2. The Trial

During the trial on April 11, 1997, Pennix raised several objections concerning jury instructions which were overruled: an instruction regarding the definition of conspiracy; a statement by the Court to the jury concerning what consituted a single transaction. In addition, Pennix requested that the jury be given a written copy of the jury charge, which request the Court denied.

3. Pennix's Appeal

Pennix timely noted his appeal to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion, the Court of Appeals found that the district court did not err in denying Pennix's proposed jury instruction regarding the evidence necessary to sustain a conspiracy conviction by holding that the actual jury charge substantially included Pennix's proposed instruction. The Court of Appeals also found that the district court had not abused its discretion by providing the jury with a

copy of the indictment but not of the jury instructions.

Pennix did not request rehearing.

STATEMENT OF FACTS

In the latter part of 1995, the FBI and the Central Virginia Task Force commenced an investigation of illegal distribution of narcotics in the area of Lynchburg, Virginia. Their investigation led them to believe that a conspiracy existed throughout central Virginia. They believed that Franklin West was the leader of the conspiracy which involved, directly or indirectly, many participants, including Ronald Lee Pennix. It was the conclusion of the investigators that West was receiving either crack or powder cocaine from out-of-state and distributing the drugs to codefendants for further distribution. It was alleged that Pennix was working closely with West, purchasing drugs from other sources and using various apartments and houses to cook powder cocaine into crack and to package and distribute it.

On June 13, 1996, Lynchburg police, operating under state authority, executed a search warrant at Pennix's residence at 1649 Kirby Street, Lynchburg, Virginia, based on information they had received from a confidential informant that Pennix had sold him cocaine from his residence on two occasions within a 24-hour period. Pennix was arrested inside the residence.

As a result of the search of his residence, police seized a digital pager, a loaded .380 handgun, a 9 mm. handgun, a briefcase containing $5,810 and $800 from a dresser drawer. Digital scales, additional ammunition and additional firearms were also found in various locations throughout the house. Outside of the house, near an oil tank, the officers found a can containing 22.82 grams of cocaine base.

As a result of his state court arrest, incident to the search on July 19, 1996, Pennix was charged in an eight count indictment, which was returned in the U.S. District Court in the Western District of Virginia, alleging from January, 1993, to July 19,

1996, that Pennix, along with seventeen others violated federal drug and firearms laws.

On November 21, 1996, a seventeen-count superseding indictment was filed in the U.S. District Court for the Western District of Virginia, charging in Count One that Pennix, and others, conspired to possess with intent to distribute cocaine hydrochloride and cocaine base in violation of 21 U.S.C. §846; Count Seven charged Pennix with distribution of cocaine base on June 13, 1996, in violation of 21 U.S.C. §841(a)(1). Count Eight charged Pennix with possession of a firearm in relation to a drug trafficking crime on June 13, 1996, in violation of 18 U.S.C. §924(c)(1).

The evidence adduced at trial on April 8, 1997, showed that most of the individuals alleged to have participated in the conspiracy did not know Pennix and were not working in concert with Pennix. The evidence linking Pennix to the alleged conspiracy came from one of the indicted co-conspirators and two other unindicted coconspirators who claimed to have individually

purchased cocaine from Pennix on several occasions.

REASONS FOR GRANTING CERTIORARI:

PENNIX'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WERE VIOLATED BY THE DISTRICT COURT'S REFUSAL OF PENNIX'S PROPOSED JURY INSTRUCTION AND BY INCORRECTLY INSTRUCTING THE JURY CONCERNING THE DEFINITION OF A "SINGLE TRANSACTION".

The United States Court of Appeals for the Fourth Circuit has entered a decision in this case which conflicts with the fair trial and due process of law provisions of the United States Constitution in such a manner which calls for an exercise of this Court's supervisory power. The standard on appeal for a court's charge to the jury is whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury. United States v. Martin, 740 F. 2d 1352, 1361 (6th Cir. 1984).

The only evidence in this case which linked Pennix to the other codefendants was the testimony of a codefendant and two unindicted coconspirators

who stated that they had bought cocaine from Pennix, individually, on several occasions, but not in relationship to any conspiracy. These isolated buys from Pennix, and Pennix's mere association with a codefendant was not enough to establish Pennix's participation in a conspiracy. This evidence proved nothing more than an association between them and Pennix.

Proof of conspiracy requires an agreement between at least two persons to take a concerted action; however, if the purposes of the alleged coconspirators are different, though both aimed at unlawful goals, there is no conspiracy. U.S. v. Guinta, 925 F.2d 758 (4th Cir. 1991).

The evidence that Pennix sold cocaine to other individuals on several occasions is not enough to link him to a broader conspiracy.

When the case went to the jury on April 11, 1997, Pennix objected to the misleading nature of following Jury Instruction given by the Court: "The Court further tells you that proof of a single buy relationship standing alone would not be sufficient

evidence to establish a conspiracy to distribute a controlled substance."

This instruction implies that if there is more than one transaction, a conspiracy has been created. In lieu of this instruction, Pennix requested that the Jury be given Defendant's Instruction 3: "A buyer or seller of illegal substances does not automatically become a member of a conspiracy. The prosecution must establish beyond a reasonable doubt that the Defendant knew the existence and scope of the conspiracy and sought to promote its success. The relationship of buyer and seller, absent any prior or contemporaneous understanding beyond the mere sales agreement, does not prove a conspiracy."

Even though the Court charged the jury that proof of a single buy relationship is not sufficient evidence to convict a person of conspiracy, without more fully instructing them, as requested by Pennix, the jury was mislead in how to apply the law to the facts in this case.

Though the Government adduced evidence that Pennix was involved in several separate drug

transactions with one of the named coconspirators in the indictment, this evidence was not sufficient to link Pennix to the overall conspiracy. By instructing the jury that a single transaction was not proof of a conspiracy, this instruction, without Defendant's refused Instruction 3, allowed the jury to conclude that more than one transaction may be proof of a conspiracy.

The Court's charge was defective and prejudicial to Pennix. The charge given to the jury allowed them to believe that proof of more than one transaction was proof of conspiracy. The jury should have been instructed that mere association with conspirators is not enough to establish participation in a conspiracy. United States v. Cooper, 567 F.2d 252, 254-55 (3d Cir. 1977). A person should not be convicted of conspiracy solely for keeping bad company. U.S. v. Guinta, 925 F.2d 758, 766 (4th Cir. 1991).

PENNIX'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WERE VIOLATED BY THE DISTRICT COURT'S ABUSE OF DISCRETION IN REFUSING TO PROVIDE THE JURY WITH A COPY OF THE INSTRUCTIONS TO REVIEW DURING THEIR DELIBERATIONS IN LIGHT OF THE FACT THAT THE COURT PROVIDED THE JURY WITH A COPY OF THE INDICTMENT.

The district court, concerned that due to the number of counts in the indictment, the jury may have difficulty "keeping them straight", provided a copy of the indictment to the jury to take to the jury room. Pennix moved the court, without objection from the Government, to allow the jury to also have a copy of the written instructions. The district court summarily denied Pennix's motion. The district court abused its discretion in refusing to provide the jury with the written charge. The indictment was not as lengthy or complex as the charge to the jury. Since the district court provided the jury with the indictment, reasoning that indictment was too complex for the jury to deliberate without it, then the district court's concern also should also have

been extended to the jury's need for a copy of the instruction for guidance in how to appy the law to the indictment, based on the evidence presented to them.

Ordinarily, it is not error for the trial court to refuse to provide the jury with a copy of the written instructions upon a motion by either party or at the request of the jury. However, where a case, as in the one at bar, is complex and involved a multicount indictment, takes place over a number of days, AND the court has provided a copy of the indictment to the jury for its deliberations, the court abuses its discretion in not providing a copy of written instrucitons to the jury. Such action places undue emphasis on the indictment without providing the jury with guidance on the rules of law they need to apply to the case.

It would be impossible for a juror to accurately recall the exacting language of a jury instruction from memory when multiple instructions are involved. In the present case, the court's decision to allow the jury to possess the indictment

indicated that the court felt the jury might have difficulty in recalling the language of the three counts involving Pennix. If this were true one can only surmise that the jury would have insurmountable difficulty in recalling instructions which were many times more lengthy than the indictment.

Though the decision whether to give the jury a written copy of the court's instructions is discretionary, this discretion should be reviewed where a case not only lasts for a period of days and pertains to a complex series of transactions in a multi-count indictment, but also where the jury has been given a copy of the indictment. U.S. v. VanDyke, 14 F.3d 415 (8th Cir. 1994). The VanDyke held that court abused its discretion in not providing the jury with a copy of the jury instructions. The reasoning for this holding was that by providing the jury with the government's formal charging document (the indictment), the court had given the jury a one-sided view of the case by not also providing them with a set of neutral written jury

instructions to guide them in their deliberations.

Any case which involves conspiracy is complex because the definition of conspiracy is complex. It is not enought to give a jury a general understanding of conspiracy law. Such general instruction is all that is given to a jury without a written charge. When instructions are read for more than thrity minutes, it is absolutely unreasonable to assume that a jury can correctly recall the very exacting language of a conspiracy instruction. No jury can even be polled to determine their recollection of the law.

Jury nullification is clearly not allowed for obvious and well-established reasons. Neither should the government be allowed to gain convictions in those cases where a jury is allowed to rely upon their mere recollection of a small portion of a very lengthy jury charge.

The court's acknowledgement that the jury could not adequately recall the details of an indictment which was much less detailed than the

charge, clearly shows that the refusal to give a written charge was arbitrary.

CONCLUSION

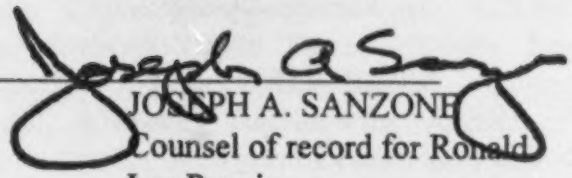
By failing to properly instruct the jury regarding what may constitute a transaction sufficient to find that someone has been involved in a conspiracy, the Court encouraged the jury to wrongfully convict Pennix of being a member of the conspiracy as alleged in Count One of the indictment.

By allowing the indictment, but not the written jury instructions, to accompany the jury to the jury room during its deliberations, the court handicapped the jury in applying the law to the case. The court's abuse of discretion was prejudicial to Pennix and cannot be said to be harmless error.

Accordingly, Pennix requests that this Court should grant certiorar and remand this case for retrial.

Respectfully submitted,

RONALD LEE PENNIX,
Petitioner

By 
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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 97-4575

RONALD LEE PENNX
Defendant-Appellant,

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v. No. 97-4576

FRANKLIN ROOSEVELT WEST, JR.
Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Virginia, at Lynchburg.
James C. Turk, District Judge.
(CR-93-63)

Argued: April 9, 1998

Decided: May 20, 1998

Before NIEMEYER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.
United States v. Pennix
COUNSEL

ARGUED: Joseph Abraham Sanzone, JOSEPH A. SANZONE ASSOCIATES, Lynchburg, Virginia, for Appellant Pennix; . Melissa Windham Friedman, Roanoke, Virginia for Appellant West. Anthony Paul Giorno, Assistant United States Attorney, Roanoke, Virginia, for Appellee. **ON BRIEF**: Anthony F. Anderson, Roanoke, Virginia, for Appellant West. Robert P. Crouch, Jr., United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted Franklin Roosevelt West, Jr. and Ronald Lee Pennix for their participation in a large scale narcotics conspiracy. The district court sentenced West to 292 months imprisonment and Pennix to 181 months imprisonment. West and Pennix appeal, asserting several trial and sentencing errors. Finding no error, we affirm.

1.

The evidence at trial demonstrated that West and Pennix participated in a large, loose-knit conspiracy to distribute crack and powder cocaine between January 1993 and November 1996 United States v. Pennix in Lynchburg and Campbell County, Virginia. West was a major supplier of both crack and powder cocaine, which was then sold by many of West's underlings, including Pennix.

On June 13, 1996, Lynchburg police, acting on a confidential tip that Pennix had twice sold cocaine from his residence within a 24-hour period, arrested Pennix at his home. In conjunction with this arrest, police seized a loaded .380 caliber handgun and a digital pager from Pennix's person, 22.82 grams of crack cocaine from his back yard hidden in a can near an oil tank, a nine millimeter handgun from his bedroom, $800 from a dresser drawer and $5,810 of currency stored in a briefcase. Police also found digital scales and ammunition in the kitchen, and firearms in other locations throughout the house.

Based on Pennix's role in the conspiracy, he was charged with and convicted of conspiracy to distribute cocaine in violation of 21 U.S.C.A. §846 (West 1981 & Supp. 1997), distribution of cocaine base in violation of 21 U.S.C.A.§841(a)(1) (West 1981 & Supp. 1997), and possession of a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C.A. §924(c)(1) (West Supp. 1997). Pennix also forfeited the $6,610 seized during the search of his home pursuant to 21 U.S.C.A. §853 (West Supp. 1997).

West was charged with conspiracy to distribute crack and powder cocaine in violation of 21 U.S.C.A. §846, and with engaging in a continuing criminal enterprise in violation of 21 U.S.C.A. §848 (West 1981 & Supp. 1997). The jury convicted West of the conspiracy charge but acquitted him of the continuing criminal enterprise charge.

On appeal, both Pennix and West challenge their convictions; Pennix also challenges his sentence. We first turn to Pennix's arguments, and then to those of West.

II.

A.

Pennix initially claims that the district court erred in denying his proposed instruction regarding the evidence necessary to sustain a conspiracy conviction. Pennix's proposed instruction states:

> A buyer or seller of illegal substance does not automatically become a member of a conspiracy. The prosecution must establish beyond a reasonable doubt that the [d]efendant knew the existence and scope of the conspiracy and sought to promote its success. The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy.

Pennix argues that the court's failure to include this instruction misled the jury into believing that a simple association with conspirators through several mere buy-sell transactions is enough to establish participation in the conspiracy. We reject Pennix's claim because the actual jury charge substantially included Pennix's proposed instruction.

The district court's denial of a requested jury instruction is reviewed only for abuse of discretion. See United States v. Stotts, 113 F. 3d 493, 496 (4th Cir.

1997). A district court abuses its discretion only if the instruction: "(1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." United States v. Lewis, 53 F. 3d 29, 32 (4th Cir. 1995) (quoting United States v. Camejo, 929 F. 2d 610, 614 (11th Cir. 1992).

Here, the district court instructed the jury that

> a conspiracy is a combination or an agreement of two or more persons to join together to attempt some unlawful purpose....[M]ere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy....[P]roof of a single buy relationship standing alone would not be sufficient evidence to establish a conspiracy to distribute a controlled substance.

Accordingly, because the district court correctly conveyed to the jury that evidence of a mere buy-sell relationship as well as evidence of mere

association does not constitute a conspiracy, no error occurred.

B.

Pennix next argues that the district court abused its discretion in providing the jury with a copy of the indictment but not of the jury instructions. Pennix claims that in light of the complexity of his case, failure to give a copy of the instructions to the jury led to unfair confusion and predisposed the jury to the government's case.

We review the district court's decision to provide the jury with copies of the indictment and jury instructions for abuse of discretion. See United States v. Polowichak, 783 F. 2d 410, 413 (4th Cir. 1986) (submission of indictment); United States v. Sotelo, 97 F. 3d 782, 792 (5th Cir.) submission of jury instruction), cert. denied, 117 S. Ct. 620 (1996). Pennix's case was not so complex that the jury would require a copy of the jury instructions. Pennix was tried with only West and one other co-defendant, John Martin (who plead guilty during the trial), on three simple drug and firearms violations. Moreover, Pennix has not produced any

evidence that the district court's decision not to provide the jury a copy of the instructions resulted in unfair prejudice or confusion. Accordingly, the court did not abuse its discretion.

Pennix nonetheless claims that the Eighth Circuit's decision in United States v. VanDyke, 14 F.3d 415 (8th Cir. 194) compels a finding in his favor. Pennix is mistaken. Because the trial in Van Dyke pertained to a complex series of transactions and a multiple count indictment involving bank fraud, the Eighth Circuit found that the district court's failure to provide a copy of the jury instructions along with a copy of the Pennix indictment led to a rare instance of reversible error. Id at 422. Numerous other errors at trial, however, also contributed to reversal in Van Dyke. The district judge constantly made inappropriate and prejudicial comments in front of the jury, failed to charge the jury orally with all of the instructions, and had not reduced any of the instructions to writing. Id. At 418, 423. Once deliberations began, the VanDyke jury also expressly requested a copy of the instructions, which the court initially refused to provide. Id. At 423. Consequently, the eighth circuit reasoned that "while there is perhaps no

single instance involving error so prejudicial to warrant reversal, we are convinced that, considered as a whole, the rights of the defendant were so prejudiced thereby as to deprive [him] of that fair and impartial trial." Id. At 424 (emphasis added) (internal quotations and citations omitted).

Pennix's trial, by contrast, suffered from none of these infirmities. As we have stated, Pennix's trial was hardly complex, and the trial judge presided over Pennix's case with equanimity and decorum, committing none of the trial errors found in VanDyke. Thus, Pennix garners little support from a case so factually dissimilar to his own as VanDyke.

C.

Pennix finally claims that he district court erred in converting the currency seized from his home into its drug equivalent for purposes of calculating his sentence. Pennix specifically contends that the $6,610 seized from his bedroom dresser and briefcase was not proceeds from narcotics sales but rather income from such lawful employment as working at a car wash, breeding rottweiler dogs, and selling refurbished vehicles.

Pennix, however, provided no evidence that this money derived from lawful sources, and so we reject his claim.

We review the district court's calculation of drug amounts only for clear error. United States v. Hicks, 948 F.2d 877, 881 (4th Cir. 1991). When calculating the amount of narcotics attributable to defendant, the court should include all relevant quantities of drugs in this calculation. See U.S.S.G. §2D1.1 comment. 12 ("types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level"); U.S.S.G. §1B1.3(a)(2) (relevant conduct provision). Seized currency may be converted to its drug equivalent for purposes of sentencing where the government furnishes some evidence that the seized currency derived from the defendant's drug related activity. See Hicks, 948 F. 2d at 882 (cash seized from defendant's home should be considered as relevant conduct and used in determining the base offense level); see also United States v. Otis, 127 F.3d 829, 836 (9th Cir. 1997) (where evidence connects money seized to drug related activities, conversion is proper), cert. Denied sub nom., Romo v. United States, 118 S. Ct. 1400 (1998);

United States v. Rios, 22 F. 3d 1024, 1027-28 (10th Cir. 1994)(same); United States v. Rivera 6 F.3d 431, 446 (7th Cir. 1993) (same).

Here the government demonstrated an adequate connection between the seized currency and Pennix's drug activity. At least one witness testified that he regularly purchased narcotics from Pennix for over two years at the same home where the money was found. The currency seized was also an unusually large sum for Pennix's admitted earning capacity, and was found along with guns, a scale, and crack cocaine. See United States v. Jackson, 3 F.3d 506, 511 (1st Cir. 1993)("When drug traffickers p[ossess large amounts of cash in ready proximity to their drug supply, a reasonable inference may be drawn that the money represents drug profits").

Pennix, on the other hand, did not offer an alternative legitimate explanation for the source of the drug proceeds. Pennix's presentencing report notes that he earned about $200 a week from his most recent job at a car wash, and that his most sizeable earnings to date amounted to $2,728 from hi8s eight-month stint in 1992 as a bag boy in a grocery store. Although Pennix

claims to have earned the seized currency breeding rottweiler dogs, only Pennix's father, who is hardly an unbiased witness, testified in the vaguest generalities to Pennix's alternative sources of income. Because "[t]he judge present at the sentencing hearing is in the best position to determine the credibility of the witnesses and the source of the currency," the district court did not err in discrediting Pennix's "remotely plausible, lawful explanation for the monies," and thus converting the seized currency into its drug equivalent. *Id* at 512.

III.

Finally, we turn to West's challenge to his conviction.

West argues that the district court's Allen charge impermissibly coerced the jury's verdict because the charge did not include a reminder to the jurors in the majority to consider the view of those in the minority.

We review the district court's decision to give an Allen charge as well as its contents for abuse of discretion. United States v. Crop, 127 F. 3d 354, 359 (4th Cir. 1997), cert. Denied, 118 S. Ct. 898 (1998). For an Allen charge to be proper, it "must not coerce the jury, and it must be fair, neutral and balanced." Id. at 359-60;

see also United States v. Burgos, 55 F. 3d 933,936 (4th Cir. 1995). We have repeatedly noted that "the most egregious mistake that can be made in the context of an Allen charge is for a district court to suggest, in any way, that jurors surrender their conscientious convictions." Cropp, 127 F. 3d at 360 (quoting Burgos, 55 F. 3d 939); see also Carter v. Burch, 34 F. 3d 257, 265 (4th Cir. 1994). We have also stressed that a proper Allen charge instructs jurors in the majority to consider the views of the minority and vice versa. Cropp, 127 F. 3d at 360. However, we have been reluctant to proscribe a set formula for an Allen charge, but rather "leave to the particular judge the task of formulating his or her complete instruction." Burgos, 55 F. 3d at 941 n. 9. Thus, so long as the specific Allen charge at issue sufficiently conveys the above principles, we will uphold its validity.

Here, the district court's Allen charge, although not a model of clarity, was adequate. The court stressed to the jury that "no juror is expected to yield to a conscientious conviction he or she may have, and that each juror must arrive at his or her verdict "without surrendering your conscientious convictions." The court

also added that "if a substantial majority...are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one;" and "on the other hand, if a majority or even a lesser number of you are for acquittal, the other jurors ought seriously to ask themselves whether they do not have a reason to doubt the correctness of [their] judgment" in light of the other juror's views. Accordingly, the charge was sufficient to withstand Pennix's challenge.

Indeed, "the jur[ors'] own behavior reassures us that they were not coerced by the instruction." Cropp, 127 F.3d at 360. We have previously found that a mixed verdict following an Allen charge strongly suggests that the jury was not coerced. Id. After the Allen charge here, the jury returned a verdict of guilty on the conspiracy charge but not guilty on the continuing criminal enterprise charge. This mixed verdict, combined with the charging language itself, sufficiently assures us that the jury was not coerced by the Allen charge in this case.

AFFIRMED.

AO245B(Rev. 3/95) Sheet 1 Judgment in a Criminal Case

United States District Court

Western District of Virginia

UNITED STATES OF AMERICA

v.

RONALD LEE PENNIX

Judgment in a Criminal Case

(For Offenses Committed on or After November 1, 1987)

Case Number: **6:96CR70063-017**

Joseph Sanzone, Esquire
Defendant's Attorney

ENTERED: 7/9/97

THE DEFENDANT:

_____ pleaded guilty to count(s)

_____ pleaded nolo contenders to count(s) which was accepted by the court.

X___ was found guilty on count(s) **1,7,8,15** after a plea of not guilty.

Title & Section: 21 U.S.C. 846

Nature of Offense: **Conspiracy to Distribute Cocaine**

Date Offense Concluded: **11/22/1996**

Count Number(s): **1** **Title & Section:** **21 U.S.C. 841(a)(1)**

Nature of Offense: **Distribution of Cocaine Base**

Date Offense Concluded: **6/13/1996**

Count Number(s): **7**

Title & Section: **21 U.S.C. 924(c)(1)**

Nature of Offense: **Possession of a Firearm in Relation to Drug Trafficking crime**

Date Offense Concluded: **6/13/1996**

Count Number(s): **8**

See Additional Counts of Conviction - Page 2

Title & Section: **21 U.S.C. 841(a)(1)**

Nature of Offense: **Distribution of Cocaine Base**

Date Offense Concluded: **6/13/1996**

Count Number(s): **7**

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

_____ The defendant has been found not guilty on count(s)

_____ Count(s) _____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

I)efendant's Soc. Sec. No.: **227-11-1554**

Defendant's Date of Birth: **10/01/1973**

Defendant's USM No.: **O6341-084**

Defendant's Residence Address: **1649 Kirby St., Lynchburg, VA 24505**

Defendant's Mailing Address: **1649 Kirby St., Lynchburg, VA 24505**

Date of Imposition of Judgment: **07/02/1997**

Signature of Judicial Officer: **Honorable James C. Turk, United States District Judge**

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK

AO245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case
Judgment-Page 2 of 9

DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER:
6:96CR70063-017

ADDITIONAL COUNTS OF CONVICTION

Title & Section: **21 U.S.C. 853**

Nature or Offense: **Criminal Forfeiture**

Date Offense Concluded: **11/22/1996**

Count Numbers): **15**

AO245B (Rev. 8/96) Sheet 2 - Imprisonment

Judgment-Page 3 of 9

DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER: **6:96CR70063-017**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **181 months. One hundred twenty-one (121) months as to Counts 1 and 7 to run concurrently with each other and Sixty (60) months as to Count 8 to run consecutively to Counts 1 and 7**

X The court makes the following recommendations to the Bureau of Prisons: **FCI, Beckley, W. Va.**

X The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

_____ at_____a.m./p.m.

on_____

_____as notified by the United States Marshal.

_____The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_____before 2 p.m. on

_____as notified by the United States Marshal.

_____as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____to_____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By_____

Deputy U.S. Marshal

DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER: **6:96CR70063-017**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 month(s).

Sixty (60) months as to Counts 1 and 7 to run concurrently with each other and Thirty-six (36) months as to Count 8 to run concurrently with Counts 1 and 7

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

____The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X____The defendant shall not possess a firearm as defined in 18 U.S.C. 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a

condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below) . The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 5

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities-,

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, *training,* or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered-,

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with *any* person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate In a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

2. Defendant shall not possess a firearm or destructive device and shall reside in a residence free of firearms and destructive devices.

3. Defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of illegal controlled substances or firearms.

CASE NUMBER: 6:96CR70063-017

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment	Fine	Restitution
Totals:	$ 300.00	
$		

_____If applicable, restitution amount ordered pursuant to plea agreement..... $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

_____The court determined that the defendant does not have the ability to pay interest and it is ordered that:

____The interest requirement is waived.

____The interest requirement is modified as follows:

RESTITUTION

_____The determination of restitution is deferred until_____. An Amended Judgment in a Criminal Case will be entered after such determination.

_____The defendant t shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee
Total Amount of Loss
Amount of Restitution Ordered
Priority Order of Percentage of Payment

Totals: $_____ $_____
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title

18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

AO 245B (Rev. 8/96) Sheet 5, Part B - Criminal Monetary Penalties

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DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER:
6:96CR70063-017

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A X in full immediately; or

B $ _____immediately, balance due (in accordance with C, D, or E);

or

C _____not later than _____; or

D _____ in installments to commence ___day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E _____ in_____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ over a period of ___year(s) to commence ____day(s) after the date of this judgment. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payments shall be made payable to Clerk, U.S. District Court P. O. Box 1234, Roanoke, VA 24006

_____Joint and Several

_____The defendant shall pay the cost of prosecution.

_____The defendant shall pay the following court cost(s):

X___The defendant shall forfeit the defendant's interest in the following property to the United States:
$6,610 in currency

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer or the United States Attorney.

AO 245B (Rev. 8/96) Sheet 6 - Statement of Reasons

Judgment-Page 8 of 9

DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER: **6:96CR70063-017**

STATEMENT OF REASONS

_____The court adopts the factual findings and guideline application in the presentence report.

OR

X ___The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Additional Factual Findings and

Guideline Application Exceptions -

Page 9

Guideline Range Determined by the Court:

Total Offense Level: 32
Criminal History Category: I

Imprisonment Range:

121 to 151 months Supervised

Release Range: 5 years

Fine Range: $17,500 to

$8,250,000.00

X Fine waived or bellow the guideline range because of inability to pay.

Total Amount of Restitution:

$_____

_____Restitution is not ordered because the complication and prolongation of the sentencing process

resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 1 8 U.S.C. 3663(

_____For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 1 8, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

_____Partial restitution is ordered for the following reason(s):

_____The sentence is within the guideline range, that range does not

exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

X The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The minimum sentence is sufficient for punishment

OR

_____The sentence departs from the guideline range:

_____upon motion of the government, as a result of defendant's substantial assistance.

_____for the following specific reason(s):

DEFENDANT: **RONALD LEE PENNIX**

CASE NUMBER: **6:96CR70063-017**

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

The seized cash is converted at the rate of $2,500 per ounce. This, when added to the seized drugs, yields a total drug liability of 95.62 grams of cocaine base.